UEM Land Bhd v Menteri Kewangan Malaysia and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(1M)-128–03 OF 2023 AND CIVIL APPEAL W-01(1M)-12–01 OF 2023
NANTHA BALAN, COLLIN SEQUERAH AND AZIZUL AZMI ADNAN JJCA
18 DECEMBER 2024

Civil Procedure — Judicial review — Application for — Taxpayers filed for judicial review against the Minister of Finance's failure to reply to requests for tax exemption and directions regarding tax assessments — Whether failure to respond (non-reply) to letter amounted to 'decision' — Whether ss 127(3A) and 135 of Income Tax Act 1967 ('the ITA') only applied to unlawfully imposed tax — Whether s 135 of ITA extended to exercise of Director General of Inland Revenue's power of assessment — Whether unlawfully levied taxes was solely within jurisdiction of Special Commissioners for Income Tax — Whether taxpayers failed to exhaust available domestic remedy provided under s 99(1) of ITA — Whether filing of judicial review in light of appeal lodged by taxpayer pursuant to s 99(1) of ITA amounted to abuse of court process — Whether order sought for order of certiorari or mandamus order — Whether failure to reply fell within ambit of reviewable decisions provided for under O 53 r 2(4) of Rules of Court 2012

The appeals arose out of different factual backgrounds relating to the taxpayers' grievances as to the tax assessments by the Director General of Inland Revenue ('DGIR') and their respective applications to the Minister of Finance ('MOF') for tax-exemption under s 127 of the Income Tax Act 1967 ('the ITA') and/or their request to the MOF for directions to be given to the DGIR under s 135 of the ITA. The taxpayers had lodged an appeal to the Special Commissioners for Income Tax ('SCIT') under s 99 of the ITA. The taxpayers also made an application to the MOF for exemption and/or for directions to be given to the DGIR. The directions that were sought were essentially for the MOF to direct the DGIR to set aside the tax that was assessed against each of the taxpayers. However, the MOF did not make any decision in response to the taxpayers' request for exemption under s 127 of the ITA or for directions under s 135 of the ITA. The MOF also did not reply to the taxpayers' letters pertaining to the requests referred to earlier. Thus, the taxpayers filed applications for leave to commence judicial review against the MOF. In Appeal 128 between UEM Land Bhd ('UEM') and MOF, leave to commence judicial review was dismissed by the High Court while in Appeal 12 between Peguam Negara Malaysia and Sykt Kapasi Sdn Bhd, leave to commence judicial review was

allowed by the High Court. The issues for consideration were: (a) whether the Minister's failure to respond (non-reply) to UEM's letter amounted to a 'decision' made by the MOF; (b) whether ss 127(3A) and 135 of the ITA only applied to unlawfully imposed tax; (c) whether s 135 of the ITA extended to the exercise of the DGIR's power of assessment; (d) whether unlawfully levied taxes was solely within the jurisdiction of the SCIT; (e) whether the taxpayers had failed to exhaust the available domestic remedy provided under s 99(1) of the ITA; (f) whether the filing of a judicial review in light of the appeal lodged by the taxpayer pursuant to s 99(1) of the ITA amounted to an abuse of court process; (g) whether the order sought for by UEM an order of certiorari or a mandamus order; and (h) whether the failure to reply fell within the ambit of reviewable decisions provided for under O 53 r 2(4) of the Rules of Court 2012 ('the ROC').

Held, allowing Appeal 128 and dismissing Appeal 12:

(1) The wording of O 53 r2(4) of the ROC was wide enough to encompass the complaint raised by UEM whether it be a non-response of the application or a refusal to make a decision. The MOF's refusal to respond (non-reply) to UEM's letter and/or their refusal to make a decision did in amount to a decision itself and therefore susceptible to judicial review (see paras 27–28).

(2) There was nothing in s 127(3A) of the ITA that gave any indication that the section only applied to lawful assessments. An ordinary interpretation of s 127(3A) of the ITA did not confine the applicability of the section to a situation where the tax imposed must be lawful to begin with (see paras 35–36).

(3) As long as the directions issued were not inconsistent with the act and the integrity of the statutory framework was preserved, it did not confine the scope of the MOF's directions to purely administrative matters but ensured that any directive issued aligned with the legislative intent and purpose of the ITA. The MOF's role under s 135 of the ITA included ensuring the proper application of the ITA by addressing errors or misapplications of the law which accorded with the true legislative intent and effective administration of taxation. Thus, the provision of s 135 of the ITA did extend to the exercise of the DGIR's power of assessment (see paras 43 & 46–47).

(4) There were no other alternative remedies available to UEM in respect of the decision of the MOF under s 127(3A) and/or s 135 of the ITA. Therefore, UEM was entitled to pursue whatever remedies were available under s 127(3A) and/or s 135 ITA and that the filing of a judicial review application did not have the effect of usurping the power and role of the SCIT. In light of this finding, the issues of (a) whether the taxpayer had failed to exhaust the available domestic remedy provided under s 99(1) of

the ITA; and (b) whether the filing of a judicial review in light of the appeal lodged by the taxpayer pursuant to s 99(1) of the ITA amounted to an abuse of court process, was answered in the negative. The filing of an appeal to the SCIT by UEM had been made as a matter of prudence or out of abundance of caution (*ex abundanti cautela*) (see paras 55–57 & 65–66).

(5) This failure to respond to UEM's request amounted to a refusal to exercise discretion under ss 135 and/or 127(3A) of the ITA to make a decision. Such omission was appropriately met by UEM seeking for an order of certiorari to quash the decision of the MOF on the grounds of illegality, irrationality and procedural impropriety, which were recognisable grounds for judicial review. Therefore, UEM was within their rights to seek for an order of certiorari to quash the decision of the MOF (see paras 73–76).

(6) The inclusion of the words actions and omissions in addition to the word decision in O 53 r 2(4) of the ROC was obviously designed to widen the scope of decisions amenable to judicial review. The grounds upon which an application for judicial review may be made was not merely confined to actual decisions in the manner commonly understood but also encompassed matters upon which a party may feel had affected them or in any way caused them to be aggrieved. Therefore, the MOF's failure to reply to UEM's letter fell squarely within the ambit of reviewable decisions provided for under O 53 r 2(4) of the ROC (see paras 84 & 86–87).

[Bahasa Malaysia summary

Rayuan-rayuan timbul daripada latar belakang fakta yang berbeza berkaitan dengan aduan pembayar cukai mengenai taksiran cukai oleh Ketua Pengarah Hasil Dalam Negeri ('KPHDN') dan permohonan masing-masing kepada Menteri Kewangan ('MK') untuk pengecualian cukai di bawah s 127 Akta Cukai Pendapatan 1967 ('ACP') dan/atau permintaan mereka kepada MK untuk arahan diberikan kepada KPHDN di bawah s 135 ACP. Pembayar cukai telah mengemukakan rayuan kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') di bawah s 99 ACP. Pembayar cukai juga membuat permohonan kepada MK untuk pengecualian dan/atau untuk arahan diberikan kepada KPHDN. Arahan yang dipohon adalah untuk MK mengarahkan KPHDN untuk mengetepikan cukai yang ditaksir terhadap setiap pembayar cukai. Walau bagaimanapun, MK tidak membuat sebarang keputusan sebagai jawapan kepada permohonan pembayar cukai untuk pengecualian di bawah s 127 ACP atau untuk arahan di bawah s 135 ACP. MK juga tidak membalas surat-surat pembayar cukai yang berkaitan dengan permohonan yang disebutkan sebelum ini. Oleh itu, pembayar cukai mengemukakan permohonan untuk kebenaran memulakan semakan kehakiman terhadap MK. Dalam Rayuan 128 antara UEM Land Bhd ('UEM') dan MK, kebenaran

untuk memulakan semakan kehakiman ditolak oleh Mahkamah Tinggi, manakala dalam Rayuan 12 antara Peguam Negara Malaysia dan Sykt Kapasi Sdn Bhd, kebenaran untuk memulakan semakan kehakiman dibenarkan oleh Mahkamah Tinggi. Isu-isu untuk pertimbangan adalah: (a) sama ada kegagalan Menteri untuk memberi menjawab (tidak membalas) surat UEM dianggap sebagai 'keputusan' yang dibuat oleh MK; (b) sama ada ss 127(3A) dan 135 ACP hanya terpakai kepada cukai yang dikenakan secara tidak sah; (c) sama ada s 135 ACP meliputi pelaksanaan kuasa taksiran KPHDN; (d) sama ada cukai yang dikenakan secara tidak sah adalah hanya dalam bidang kuasa PKCP; (e) sama ada pembayar cukai telah gagal untuk menggunakan remedi domestik yang tersedia di bawah s 99(1) ACP; (f) sama ada pemfailan semakan kehakiman berhubung dengan rayuan yang dikemukakan oleh pembayar cukai menurut s 99(1) ACP dianggap sebagai penyalahgunaan proses mahkamah; (g) sama ada perintah yang dipohon oleh UEM adalah perintah certiorari atau perintah mandamus; dan (h) sama ada kegagalan untuk menjawab adalah dalam lingkungan keputusan yang boleh disemak di bawah A 53 k 2(4) Kaedah-Kaedah Mahkamah 2012 ('KKM').

Diputuskan, membenarkan Rayuan 128 dan menolak Rayuan 12:

(1) Perkataan A 53 k 2(4) KKM adalah cukup luas untuk merangkumi aduan yang dibangkitkan oleh UEM sama ada ketiadaan jawapan terhadap permohonan atau penolakan untuk membuat keputusan. Kegagalan MK untuk memberi jawapan (tidak membalas) kepada surat UEM dan/atau penolakannya untuk membuat keputusan adalah dianggap sebagai keputusan itu sendiri dan oleh itu boleh terbuka kepada semakan kehakiman (lihat perenggan 27–28).

(2) Tiada apa-apa dalam s 127(3A) ACP yang menunjukkan bahawa seksyen tersebut hanya terpakai kepada taksiran yang sah. Tafsiran biasa s 127(3A) ACP tidak membataskan penggunaan seksyen tersebut kepada situasi di mana cukai yang dikenakan mesti sah dari awal (lihat perenggan 35–36).

(3) Selagi arahan yang dikeluarkan tidak bercanggah dengan akta dan integriti rangka perundangan dipelihara, ia tidak membataskan skop arahan MK kepada perkara pentadbiran semata-mata tetapi memastikan bahawa mana-mana arahan yang dikeluarkan sejajar dengan niat dan tujuan perundangan ACP. Peranan MK di bawah s 135 ACP termasuk memastikan penggunaan tepat ACP dengan menangani kesalahan atau penyalahgunaan undang-undang yang sepadan dengan niat perundangan yang sebenar dan pentadbiran cukai yang efektif. Oleh itu, peruntukan s 135 ACP meliputi pelaksanaan kuasa pentaksiran DGIR (lihat perenggan 43 & 46–47).

(4) Tiada remedi alternatif lain yang tersedia kepada UEM berkenaan dengan keputusan MK di bawah s 127(3A) dan/atau s 135 ACP. Oleh

itu, UEM berhak untuk melaksanakan apa-apa remedi yang tersedia di bawah s 127(3A) dan/atau s 135 ACP dan pemfailan permohonan semakan kehakiman tidak mempunyai kesan untuk merampas kuasa dan peranan PKCP. Berdasarkan penemuan ini, isu: (a) sama ada pembayar cukai telah gagal untuk menggunakan remedi domestik yang tersedia di bawah s 99(1) ACP; dan (b) sama ada pemfailan semakan kehakiman berhubung dengan rayuan yang dikemukakan oleh pembayar cukai menurut s 99(1) ACP dianggap sebagai penyalahgunaan proses mahkamah, dijawab dengan negatif. Pemfailan rayuan kepada PKCP oleh UEM telah dibuat sebagai langkah berhati-hati atau atas kelebihan berjaga-jaga (ex abundanti cautela) (lihat perenggan 55–57 & 65–66).

(5) Kegagalan untuk memberi jawapan kepada permohonan UEM adalah dianggap sebagai penolakan untuk menggunakan budi bicara di bawah ss 135 dan/atau 127(3A) ACP untuk membuat keputusan. Peninggalan sedemikian dipenuhi dengan wajar oleh UEM yang memohon perintah certiorari untuk membatalkan keputusan MK atas alasan menyalahi undang-undang, tidak rasional dan ketidakwajaran prosedur, yang merupakan alasan yang diakui bagi semakan kehakiman. Oleh itu, UEM berhak untuk memohon perintah certiorari bagi membatalkan keputusan MK (lihat perenggan 73–76).

(6) Kemasukan perkataan tindakan dan peninggalan di samping perkataan keputusan dalam A 53 k 2(4) KKM jelas direka untuk meluaskan skop keputusan yang terbuka kepada semakan kehakiman. Alasan di mana permohonan bagi semakan kehakiman boleh dibuat tidak terhad kepada keputusan sebenar dalam cara yang difahami secara umum tetapi juga merangkumi perkara-perkara yang dirasakan telah mempengaruhi mereka atau dengan cara lain menyebabkan mereka terkilan. Oleh itu, kegagalan MK untuk membalas surat UEM terjatuh dengan tepat dalam lingkungan keputusan yang boleh disemak seperti yang diperuntukkan di bawah A 53 k 2(4) KKM (lihat perenggan 84 & 86–87).]

Cases referred to

Allianz General Insurance Co (M) Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] 4 MLJ 498, CA (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal [2024] 3 MLJ 433, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Muhibbah Engineering (M) Bhd (Civil Appeal No 01(f)-2–02 of 2022(W)) (unreported) (refd)

Ketua Pengarah Jabatan Hasil Dalam Negeri v Rheem (Far East) Pte Ltd [1998] MLJU 402; [1998] 2 CLJ Supp 351, HC (refd)

Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2024] MLJU 2014, CA (refd)

Korean Development Corporation v Government of Malaysia & Anor [1986] 2 MLJ 53 (refd)

Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 MLJ 493, CA (refd)

Majlis Bandaraya Pulau Pinang v Datin Noorzaina binti Mat Zain & Anor [2019] MLJU 46; [2019] 4 CLJ 36, CA (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490; [2012] 1 CLJ 805, FC (refd)

Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal [2023] 6 MLJ 483; [2023] 10 CLJ 329, FC (refd)

Muhibbah Engineering (M) Berhad v Ketua Pengarah Hasil Dalam Negeri [2022] 4 MLJ 660, CA (refd)

Peguam Negara Malaysia v CMMT Investment Limited (Appeal No W-01(1M)-575–10 of 2021) (unreported), CA (refd)

Peguam Negara Malaysia v Dr Micheal Jeyakumar Devaraj [2012] 1 MLJ 179, CA (refd)

Ridge v Baldwin and others [1963] 2 All ER 66, HL (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413, CA (refd)

Syarikat Kapasi Sdn Bhd v Menteri Kewangan Malaysia and other cases [2023] MLJU 524, HC (refd)

UEM Land Sdn Bhd v Menteri Kewangan Malaysia [2023] 12 MLJ 289, HC (refd)

Walter Annamunthodo v Oilfield Workers' Trade Union [1961] AC 945; [1961] 3 WLR 650, PC (refd)

Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2023] 4 MLJ 753, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Income Tax Act 1967 ss 33(1), 97(1)(a), 99, 99(1), 127, 127(3)(b), (3A), 135
Interpretation Acts 1948 and 1967 s 95(1)
Local Government Act 1976 s 9
Real Property Gains Tax 1976
Rules of Court 2012 O 53 rr 2(4), 3(6), Forms 109, 110
Rules of High Court 1980 (repealed by Rules of Court 2012) O 53 r 2(4)

Appeal From: *UEM Land Sdn Bhd v Menteri Kewangan Malaysia* [2023] 12 MLJ 289 (High Court, Kuala Lumpur)

S Saravana Kumar (Tan Jia Hua and Dharshini Sharma with him) (Rosli Dahlan Saravana Partnership) for the appellant.

Shamsul Bolhassan (Ahmad Hanir Hambali @ Arwi, Liew Horng Bin, Farah Shuhadah, Nur Idayu bt Amir, Azza bt Azmi, Kogilambigai Muthusamy and Krishna Priya a/p Veenagopal @ Venugopal with him) (Attorney General's Chambers) for the respondent.

Collin Sequerah JCA:

[1] The grounds represent our unanimous decision.

BACKGROUND

[2] There were initially 19 appeals before us and they are all appeals from the decisions of the High Court where in nine cases, leave to commence judicial review was granted, whilst in ten cases, the High Court declined to grant leave.

[3] One of these appeals has since been withdrawn which leaves us now with 18 appeals altogether. The 18 appeals shall hereafter be referred to collectively as 'the appeals'.

[4] The appeals arise out of different factual backgrounds relating to the taxpayers' grievances as to the tax assessments by the Director-General of Inland Revenue ('DGIR') and their respective applications to the Minister of Finance ('MOF') for tax-exemption under s 127 of the Income Tax Act 1967 ('the ITA') and/or their request to the MOF for directions to be given to the DGIR under s 135 of the ITA.

[5] But it is agreed that the appeals do give rise to the same legal questions. In each of the cases, the taxpayer had lodged an appeal to the Special Commissioners for Income Tax ('SCIT') under s 99 of the ITA.

[6] And in each of these cases, the taxpayer also made an application to the MOF for exemption and/or for directions to be given to the DGIR. The directions that were sought were essentially for the MOF to direct the DGIR to set aside the tax that was assessed against each of the taxpayers.

[7] The factual issue which is common to all the appeals is that the MOF did not make any decision in response to the taxpayers' request for exemption under s 127 of the ITA or for directions under s 135 of the ITA.

[8] And further the MOF also did not reply to the taxpayers' letters pertaining to the requests referred to earlier. Thus, the taxpayers filed applications for leave to commence judicial review against the MOF.

[9] Learned counsel for the taxpayers in the appeals and senior federal counsel ('SFC') who appeared for the MOF came to an agreement as to the manner in which the appeals are to be taken up before this court.

[10] The agreement is that they will only make submissions in respect of two appeals, namely Civil Appeal No W-01(IM)-128–03 of 2023 where leave to commence judicial review was dismissed and Civil Appeal No W-01(IM)-12–01 of 2023 where leave to commence judicial review was allowed.

[11] It was also agreed between learned counsel and SFC that the decision of this court in the two appeals will bind the appeals.

[12] In Civil Appeal No W-01(IM)-128–03 of 2023 ('Appeal 128') between UEM Land Bhd (appellant) ('UEM') and Menteri Kewangan Malaysia (respondent) leave to commence judicial review was dismissed by the High Court's order dated 13 March 2023. The High Court's grounds of judgment is reported as: *UEM Land Sdn Bhd v Menteri Kewangan Malaysia* [2023] 12 MLJ 289 (HC).

[13] In Civil Appeal No W-01(IM)-12–01 of 2023 ('Appeal 12') between Peguam Negara Malaysia (appellant) and Sykt Kapasi Sdn Bhd (respondent) ('Kapasi') leave to commence judicial review was allowed by the High Court per the High Court order dated 20 December 2022. The decision of the High Court is reported as: *Syarikat Kapasi Sdn Bhd v Menteri Kewangan Malaysia And Other Cases* [2023] MLJU 524; [2023] CLJU 459; [2023] 1 LNS 459; [2023] AMEJ 0471 (HC).

[14] Although there are two appeals considered here, for convenience and to eliminate confusion, all references to the parties in this judgement will only be with reference to Appeal W-01(IM)-128–03 of 2023 between UEM and MOF, where parties hereinafter will be referred to as UEM and MOF respectively, unless otherwise indicated.

Statutory provisions under the ITA

[15] The relevant statutory provisions under the ITA that will be referred to are s 99, 127(3A) and 135:

> Section 99 Right of Appeal
>
> (1) A person aggrieved by an assessment may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment.
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> Section 127 Exemption from Tax: General

(3A) The Minister may, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

Section 135 Power of Minister to give directors to Director General.

The Minister may issue directions of the general character to the Director General of the Inland Revenue in accordance with the ITA and such directions shall be given effect by the DGIR.

[16] The following grounds will deal with the main and relevant issues raised in this appeal although not necessarily in the order or manner as submitted by the parties.

[17] The issues addressed may also include a number of sub-issues which can and will be dealt with under the convenient heading of the main issues.

ISSUES

Did the Minister's failure to respond (non-reply) to UEM's letter amount to a 'decision' made by the MOF?

[18] The issue here is whether the failure of the MOF to respond to UEM's request can be amenable to judicial review. In other words, can the omission of the MOF be susceptible to judicial review.

[19] This question has been settled by high authority. In *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490; [2012] 1 CLJ 805, the Federal Court adopted the House of Lords' decision in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 which held that a refusal by the decision-maker to make a decision can also be subject to judicial review.

[20] In the judgment, Raus Sharif FCJ (as he then was) stated:

[26] It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. *In England, in the case of Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 *the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a REFUSAL BY HIM TO MAKE A DECISION, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.*

[27] *We adopt the same view.* Under the scheme of O 53 of the RHC, only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review. (Emphasis added).

[21] In the case of *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493, the dissenting judgement of Lord Denning was adopted as follows:

> *Whatever the nature of the communication, there must be a response within a reasonable time. Otherwise it will be a case of poor administration*. And the law does not sanction poor administration.
>
> Indeed, in *Padfield and Others Appellants v Minister of Agriculture, Fisheries and Food and Others Respondents* [1968] AC 997, the House of Lords approved Lord Denning's dissent in the Court of Appeal in that case where he said:
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> > Good administration requires that complaints should be investigated and that grievances should be remedied. (Emphasis added).

[22] UEM had stated in its letter dated 6 May 2021 that failure by the MOF to respond to the letter, will be treated as a rejection by the MOF and that UEM shall proceed to commence the necessary legal proceedings on this premise.

[23] UEM submitted that to date, the MOF has yet to respond to the said letter dated 6 May 2021.

[24] In this regard, O 53 r 2(4) of the Rules of Court 2012 reads (relevantly) as follows:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty of function shall be entitled to make the application.

[25] It is clear from the current amended order O 53 r 2(4) of the Rules of Court 2012, in stark contrast to the manner in which the previous order was worded, that omissions may in certain circumstances and situations, be susceptible to judicial review.

[26] The submission by the SFC that UEM cannot approbate and reprobate by taking the initial stand that the non-response is a rejection of their application and cannot now state that there has been a refusal to make a decision, is with respect, splitting hairs and finds no favour with us.

[27] It is our considered view that the wording of O 53 r 2(4) of the ROC is wide enough to encompass the complaint raised by UEM whether it be a non-response of the application or a refusal to make a decision.

[28] We therefore hold that the MOF's refusal to respond (non-reply) to UEM's letter and/or their refusal to make a decision did in fact amount to a decision itself and therefore susceptible to judicial review.

Does ss 127(3A) and 135 of the ITA only apply to unlawfully imposed tax?

[29] The MOF contended that the sections are inoperative for unlawfully imposed tax.

[30] It was argued by the MOF that since it was contended by UEM that the incomes in question were not liable to tax as the income had not been adjusted by deducting contribution made by UEM for waiver of bumiputra, foreign quota and low-cost construction under ss 33(1) and 127(3A) of the ITA has no application at all, the logic presumably being that the tax imposed must be lawful in order to claim exemption.

[31] UEM however, argued that the section is an enabling provision which enables the MOF to exempt a person from taxation income without declaring the exemption unlike the previous section under s 127(3)(b).

[32] In the Sykt Kapasi appeal ie Civil Appeal No W-01(IM)-12–01 of 2023, Kapasi had disagreed with the DGIR in taking the gain on the disposal of the car parks at KKTS 1 and 2 as business income and disputed the issuance of notices of assessments as being wrong in law since it should have been assessed under the Real Property Gains Tax 1976 and not under the ITA.

[33] UEM argued that according to s 95(1) of the Interpretation Acts 1948 and 1967, s 127(3A) is an enabling provision, the particular subject here being to enable the MOF to exempt a person from taxation income without declaring the exemption.

[34] We tend to agree here with the submission advanced by learned counsel for UEM and Kapasi. The underlying principle here is that Parliament does not legislate in vain and the clear purpose here was to endow the MOF with wider powers than previously.

[35] The contention by the MOF seeks to read into the provision words introducing restrictions and conditions which are not reflected in the section. Further, there is nothing in s 127(3A) of the ITA that gives any indication that the section only applies to lawful assessments.

[36] We therefore hold that an ordinary interpretation of s 127(3A) of the ITA does not confine the applicability of the section to a situation where the tax imposed must be lawful to begin with.

Does s 135 extend to the exercise of the DGIR's power of assessment?

[37] A related issue following from the above is whether directions issued under s 135 are limited to administrative and general matters.

[38] The SFC arguing on behalf of MOF took the view that s 135 does not grant the MOF quasi-judicial powers and that the MOF's role is purely administrative under the said provision.

[39] It was further argued by the MOF that Parliament has deliberately excluded the MOF from inquiring into the merits with regard to assessments made by the DGIR.

[40] A plain reading of the section however, makes it clear that the only caveat imposed is that the directions given must not be inconsistent with the Act.

[41] In that regard, we agree with the submission of UEM that drawing from an analagous position with regard to s 9 of the Local Government Act 1976 and the pronouncement of the Court of Appeal in *Majlis Bandaraya Pulau Pinang v Datin Noorzaina binti Mat Zain & Anor* [2019] MLJU 46; [2019] 4 CLJ 36 where s 9 was accorded a broad interpretation to encompass policy directions coupled with the caveat that the directions must not be inconsistent with the Act, and that the MOF is endowed with powers to oversee and where necessary, issue directions to the DGIR.

[42] Our position is fortified by the decision of this court in *Peguam Negara Malaysia v CMMT Investment Limited* (Appeal No W-01(1M)-575–10 of 2021) (unreported) which affirmed the decision of the High Court in the same case where leave was granted to the taxpayer to commence judicial review against the MOF in circumstances similar to the one before us, namely, the Minister's power under ss 135 and/or 127(3A) of the ITA without the necessity of first considering the lawfulness of the assessments.

[43] We further agree with the submission advanced by learned counsel for UEM that as long as the directions issued are not inconsistent with the , Act and the integrity of the statutory framework is preserved, it does not confine the scope of the MOF's directions to purely administrative matters but ensures that any directive issued aligns with the legislative intent and purpose of the ITA.

[44] With the greatest of respect, we are also unable to subscribe to the views of the HCJ that directions issued under s 135 must be administrative and

general in nature solely because the section falls under the chapter titled 'Administration' and hence does not include giving directions to the DGIR to set aside the assessments.

[45] The clear and explicit language employed by s 135 grants the MOF authority to give directions of a general character regarding the exercise of functions of the DGIR under this Act and thus is not merely limited to the matters falling under the administrative chapter.

[46] We finally fully subscribe to the views advanced by UEM that the MOF's role under s 135 includes ensuring the proper application of the ITA by addressing errors or misapplications of the law which accords with the true legislative intent and effective administration of taxation.

[47] We hold thus that the provision of s 135 of the ITA does extend to the exercise of the DGIR's power of assessment.

Are unlawfully levied taxes solely within the jurisdiction of the Special Commissioners of Income Tax (SCIT)?

[48] The MOF contended that filing a judicial review application effectively usurps the role of the SCIT and undermines the objective sought to be addressed by s 99(1) of the ITA.

[49] UEM on the other hand, submitted that their application to the MOF for a review of the DGIR's decision does not fall under the definition of an 'appeal' as envisaged in s 99(1) of the ITA.

[50] By way of reply, the MOF submitted that it was never their contention that UEM should appeal to the SCIT against the MOF's decision in rejecting UEM's request for direction to be given pursuant to s 135 and/or application under s 127(3A) of the ITA.

[51] The MOF contended that what UEM ought to have done was to first exhaust their right of appeal to the SCIT pursuant to s 99(1) of the ITA.

[52] Both the cases of *Ketua Pengarah Jabatan Hasil Dalam Negeri v Rheem (Far East) Pte Ltd* [1998] MLJU 402; [1998] 2 CLJ Supp 351 and *Korean Development Corporation v Government of Malaysia & Anor* [1986] 2 MLJ 53, cited by UEM, makes it clear that the SCIT has limited jurisdiction and as a creature of statute can only exercise the powers expressly conferred upon it by the ITA.

[53] Any grievances a taxpayer may have outside of the appeal procedure under s 99(1) of the ITA can therefore only be subject to the judicial review procedure.

[54] The focal point of challenge by UEM was directed towards the MOF for failure to exercise his powers under s 127(3A) and/or s 135 of the ITA and not directed towards the DGIR's assessment.

[55] We agree with the submission by learned counsel for UEM that there are no other alternative remedies available to them in respect of the decision of the MOF under ss 127(3A) and/or 135 of the ITA.

[56] We therefore hold that UEM was entitled to pursue whatever remedies were available under s 127(3A) and/or s 135 of the ITA and that the filing of a judicial review application does not have the effect of usurping the power and role of the SCIT.

Whether the tax payer had failed to exhaust the available domestic remedy provided under s 99(1) of the ITA?

[57] In light of our finding above, the answer has to be in the negative.

[58] This point has also been decided by good authority. In *Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal* [2023] 6 MLJ 483; [2023] 10 CLJ 329, the Federal Court held:

> [52] And the existence of the appeal procedure in s 99(1) of the ITA does not preclude or oust the right of judicial review against the determination of a statutory tribunal, namely the SCIT.

[59] See also *Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2023] 4 MLJ 753, to similar effect.

[60] The Federal Court in the recent case of *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd and another appeal* [2024] 3 MLJ 433, held that the availability of alternative remedies does not serve as a bar to the granting of leave to commence derivative action.

[61] In both *Walter Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945; [1961] 3 WLR 650 and *Ridge v Baldwin and others* [1963] 2 All ER 66, the Privy Council and the House of Lords respectively have held that the mere fact that the applicant has filed its appeal to the tribunal does not mean that he has lost his rights to appeal to the court by way of judicial review.

[62] In *Ridge v Baldwin and others*, the House of Lords held:

> *Finally there is the question whether by appealing to the Secretary of State the appellant is in some way prevented from now asserting the nullity of the respondent's decision*. A person may be prevented form asserting the truth by estoppel but it is not seriously argued that that doctrine applies here. *Then it is said that the appellant elected to go to the Secretary of State and thereby waived his right to come to the court. That appears to me to be an attempt to set up what is in effect estoppel where the essential elements for estoppel are not present. There are many cases where two remedies are open to an aggrieved person but THERE IS NO GENERAL RULE THAT BY GOING TO SOME OTHER TRIBUNAL HE PUTS IT OUT OF HIS POWER THEREAFTER TO ASSERT HIS RIGHTS IN COURT*: and there was no express waiver because in appealing to the Secretary of State the appellant reserved his right to maintain that the decision was a nullity ... (Emphasis added.)

[63] See also the recent decision of the Court of Appeal in *Kind Action (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2024] MLJU 2014 to similar effect.

[64] In any event, the question of the availability of alternative remedy should only be dealt with at the substantive stage and not at the leave stage of a judicial review application. See *Ketua Pengarah Hasil Dalam Negeri v Muhibbah Engineering (M) Bhd* (Civil Appeal No 01(f)-2–02 of 2022(W)) (unreported) affirming the Court of Appeal decision in *Muhibbah Engineering (M) Berhad v Ketua Pengarah Hasil Dalam Negeri* [2022] 4 MLJ 660 and *Allianz General Insurance Co (M) Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] 4 MLJ 498.

Whether the filing of a judicial review here in light of the appeal lodged by the taxpayer pursuant to s 99(1) of the ITA amounted to an abuse of court process?

[65] In the light of our findings above, the answer is in the negative.

[66] We further agree with the submission that the filing of an appeal to the SCIT by UEM has been made as a matter of prudence or out of abundance of caution (*ex abundanti cautela*).

[67] This is because otherwise, the assessments would be deemed final and conclusive under s 97(1)(a) of the ITA.

Was the order sought for by the appellant an order of certiorari or a mandamus order?

[68] The learned High Court judge (the HCJ) here had held that the remedy sought for by UEM was in the nature of a mandamus order. In doing so, the HCJ placed reliance on *Peguam Negara Malaysia v Dr Micheal Jeyakumar*

Devaraj [2012] 1 MLJ 179.

[69] However, as pointed out by learned counsel for UEM, the High Court in *Syarikat Kapasi Sdn Bhd v Menteri Kewangan Malaysia and other cases* [2023] MLJU 524 distinguished *Micheal Jeyakumar Devaraj* and held as follows:

> [49] In the instant case, the statutory power given to the Minister to give a direction to the DGIR not inconsistent with the ITA cannot be construed as a policy consideration, as in *Micheal Jeyakumar Devaraj*. *The power of the Minister is housed in the ITA. It is a statutory power.* It is not a power based on policy consideration of the government of the day. (Emphasis added.)

[70] The High Court in the *Syarikat Kapasi* case thus held that mandamus is inapplicable as the MOF possesses statutory power to issue or give directions to the DGIR as provided for in the ITA and this is not based on policy considerations.

[71] We have already held that the failure of the Minister to respond to UEM's request can be amenable to judicial review.

[72] The current judicial review application filed by UEM originated from the MOF's failure to respond to the letter from UEM dated 6 May 2021.

[73] We agree based upon the authorities cited that this failure amounted to a refusal to exercise discretion under ss 135 and/or 127(3A) of the ITA to make a decision. It is pertinent also to note that the MOF has provided no response or reason for its refusal to reply to the said letter.

[74] Such omission was therefore appropriately met by UEM seeking for an order of certiorari to quash the decision of the MOF on the grounds of illegality, irrationality and procedural impropriety, which are of course recognisable grounds for judicial review.

[75] The proper relief therefore available and utilised by UEM here was to seek to quash the decision made by the tax authority which was perceived by UEM to constitute an improper exercise of statutory authority and/or in excess of their jurisdiction.

[76] We therefore hold that UEM was within their rights to seek for an order of certiorari to quash the decision of the MOF.

[77] In response to the contention by the MOF that that the leave application is frivolous due to the absence of an order of certiorari, one of

UEM's prayer's in Form 109 was for the High Court to grant 'all other and further relief which this honourable court deems fit and proper' in the prayers for relief.

[78] In any event, the court has wide discretionary power to issue an order of certiorari even if it was not expressly prayed for as the courts are vested with inherent powers to grant the appropriate remedy to fit the factual matrix of the case, and to grant such relief as merits the ends of justice.

[79] See *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 and para 1 of the Schedule to the Courts of Judicature Act 1964, which reads:

> 1 Prerogative writs
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, *or any others, for the enforcement of the rights conferred bv Part II of the Constitution, or any of them, or for any purpose*. (Emphasis added.)

Threshold for leave applications

[80] It is trite that the threshold for leave to be granted is extremely low with the sole question being whether or not the application is frivolous and/or vexatious.

[81] See the Federal Court decision in *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim*.

[82] It is also pertinent and instructive to hearken to the wordings of O 53 r 2(4) which reads:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty of function shall be entitled to make the application

[83] It is perhaps also relevant for context and effect to consider by way of comparison the wordings of the previous O 53 r 2(4) of the RHC, which read as follows:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[84] The inclusion of the words actions and omissions in addition to the word decision was obviously designed to widen the scope of decisions amenable to judicial review.

[85] Order 53 r 3(6) of the ROC further amplifies the scope as evident from the wordings used as follows:

> An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[86] It is clear that the grounds upon which an application for judicial review may be made is not merely confined to actual decisions in the manner commonly understood but also encompasses matters upon which a party may feel has affected them or in any way caused them to be aggrieved.

[87] It is therefore clear that the MOF's failure to reply to UEM's letter dated 6 May 2021 fell squarely within the ambit of reviewable decisions provided for under O 53 r 2(4) of the ROC and further supported by the authorities referred to above.

DECISION

[88] In the premises and based upon the reasons given above, we therefore allow Civil Appeal No W-01(IM)-128–03 of 2023 ('Appeal 128') between UEM Land Berhad (appellant) ('UEM') and Menteri Kewangan Malaysia (respondent). We make no order as to costs.

[89] We also accordingly dismiss Civil Appeal No W-01(IM)-12–01 of 2023 ('Appeal 12') between Peguam Negara Malaysia (appellant) and Sykt Kapasi Sdn Bhd (respondent). We make no order as to costs.

[90] As previously agreed by the parties here, these two decisions will bind the parties with respect to all the appeals before us.

[91] By consent, it is agreed by the parties that UEM shall proceed to file Form 110 in each of the relevant judicial review applications in the High Court and further that the substantive hearings of all the judicial review applications in the High Court be stayed pending filing of the leave applications in the Federal Court by the Attorney General Chambers and the disposal of such leave applications, if filed, and if such applications are not filed within the time period stipulated, then the stay lapses and the substantive hearings will proceed in the High Court.

Appeal 128 allowed and Appeal 12 dismissed.

Reported by Nabilah Syahida Abdullah Salleh